UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION 3:23-cr-194-FDW-SCR-1

UNITED STATES OF AMERICA,)	
Plaintiff,)	
vs.)	ODDED
EVAN AGUSTIN PEREZ,)	<u>ORDER</u>
Defendant.)	
)	

THIS MATTER is before the Court on the Defendant's Motion for an Order of Voluntarily Dismissal of the Defendant's Motion to Vacate filed pursuant to 28 U.S.C. § 2255 [Doc. 37], and on the Defendant's *pro se* "Withdrawal of Appeal" [Doc. 35].

The Defendant filed a *pro se* Motion to Vacate pursuant to 28 U.S.C. § 2255 in which he argues that trial counsel was ineffective for failing to file a notice of appeal pursuant to Defendant's request. [Doc. 27]. The Court ordered the Government to respond. [Doc. 28]. The Government filed a Response in which it conceded that an evidentiary hearing is required on the Defendant's claim because prior counsel denies the Defendant's allegations. [See Docs. 31, 31-1]. Accordingly, the Court set an evidentiary hearing and appointed counsel to represent the Defendant for purposes of the hearing. [See Doc. 32].

On February 11, 2025, the instant *pro se* "Withdrawal of Appeal" dated February 4, 2025, was docketed. [Doc. 35]. In it, the Defendant asks to "formally withdraw" his § 2255 Motion to Vacate, and requests information regarding any additional steps that are required to "finalize this withdrawal...." [Id. at 1]. On February 12, 2025, appointed counsel filed the instant Motion for an Order of Voluntarily Dismissal, indicating that appointed counsel has conferred with the

Defendant regarding his Motion to Vacate and that the Defendant now wishes to voluntarily dismiss the matter. [Doc. 37]. The Motion for an Order of Voluntary Dismissal indicates that the Government does not object. [Id. at 3].

The Defendant's unauthorized *pro se* "Withdrawal..." will be stricken. <u>See generally McKaskle v. Wiggins</u>, 465 U.S. 168, 183 (1984) (there is no right to "hybrid representation" in which defendant is represented both by himself and by counsel); <u>Cain v. Peters</u>, 972 F.2d 748, 750 (7th Cir.1992) (representation by counsel and self-representation are mutually exclusive entitlements in light of McKaskle).

The Court has considered the relevant factors and counsel's unopposed Motion will be granted and this matter is dismissed without prejudice. <u>See</u> Fed. R. Civ. P. 41(a)(2); <u>Howard v. Inova Health Care Servs.</u>, 302 F. App'x 166, 178-79 (4th Cir. 2008) (citation omitted). The Clerk will be instructed to cancel the scheduled evidentiary hearing.

IT IS, THEREFORE, ORDERED, that:

- 1. The Defendant's Motion for an Order of Voluntarily Dismissal of the Defendant's Motion to Vacate filed pursuant to 28 U.S.C. § 2255 [Doc. 37] is **GRANTED**.
- 2. The pro se Motion to Vacate [Doc. 27] is **DISMISSED WITHOUT PREJUDICE**.
- 3. The Defendant's *pro se* "Withdrawal of Appeal" [Doc. 35] is **STRICKEN**.

The Clerk is respectfully instructed to cancel the evidentiary hearing in this matter [see Docs. 32, 33] and to mail a copy of this Order to Mr. Perez.

Signed: February 13, 2025

Frank D. Whitney

Senior United States District Judge